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No. 04-041494

In The
# Supreme Court of the United States

YANCEY L. WHITE,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

The federal statute on credit for good conduct in prison, 18 U.S.C. § 3624(b)(1), provides in relevant part:

> a prisoner who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration of a prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. . . . [C]redit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

The phrase "term of imprisonment" appears four times in that section. There is no dispute that the first two times it refers to the years imposed by the sentencing judge. But the third time the statute refers to the "term of imprisonment," the Bureau of Prisons interprets it to allow 54 days of credit per year *served*, rather than per year *imposed*. With a lengthy and complicated mathematical calculation in Bureau of Prisons Program Statement 5880.28, the Bureau of Prisons determined that prisoners are allowed up to 47 days of good time credit per year imposed, and not 54 days. Petitioner asks:

Under 18 U.S.C. § 3624(b)(1), are prisoners on good behavior entitled to 54 days of good time credit per year of the sentence imposed, as the statute's plain terms and its legislative history provide, or 47 days as the Bureau of Prisons has decided?

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Yancey L. White, respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit appears at Appendix A-1 to the Petition and is reported at 390 F.3d 997 (7th Cir. 2004). That court also denied a petition for rehearing *en banc* by an unpublished order dated February 9, 2005, found at Appendix A-2.

The opinion of the United States District Court for the Western District of Wisconsin appears at Appendix B to the Petition and is reported at 314 F. Supp.2d 834 (W.D. Wis. 2004).

## JURISDICTION

The United States Court of Appeals for the Seventh Circuit decided Petitioner's case on December 2, 2004. The petitioner filed a petition for rehearing *en banc* on January 24, 2005. The United States Court of Appeals for the Seventh Circuit denied that petition on February 9, 2005.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

18 U.S.C. § 3624(b) appears in full at Appendix C

## REGULATIONS INVOLVED

28 C.F.R. § 523.20 appears in full at Appendix D

## OTHER AUTHORITIES INVOLVED

Bureau of Prisons Program Statement 5880.28 is 257-pages long, too voluminous to be included as an appendix to this petition. It may be obtained from the Bureau of Prisons website at: http://www.bop.gov/policy/progstat/5880_028.pdf

## STATEMENT OF THE CASE

This case invites the Court to consider the incarceration of more than 150,000 federal prisoners beyond the time Congress intended – and beyond the time sentencing judges thought they imposed – on the say of the Bureau of Prisons. Petitioner won in the district court, lost in the court of appeals, and comes finally to this Court.

In 1996, the United States District Court for the Southern District of Illinois sentenced Petitioner to three concurrent 120-month terms of imprisonment after his convictions for distributing cocaine base. The federal Bureau of Prisons (BOP) then took custody of Petitioner.

Later, the warden of the Federal Correctional Institution in Oxford Wisconsin, Joseph Scibana, communicated

to Petitioner that he had earned the maximum amount of good time credit allowed under statute, 18 U.S.C. § 3624(b)(1), with the exception of ten days lost credit for a disciplinary infraction. The BOP used a formula in its Program Statement 5880.28, SENTENCING COMPUTATION MANUAL, to calculate a maximum of 47 good time days per year imposed. Accordingly, the BOP credited Petitioner with 460 days of good time credit on his 10-year sentence.

Petitioner contended that the maximum good time available to him was 540 days under 18 U.S.C. § 3624(b)(1). He formally contested the good time calculation, but the BOP ruled against him. After exhausting administrative remedies, Petitioner filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2241 in the Western District of Wisconsin, where he was incarcerated. Petitioner asked the court to order Warden Scibana to recalculate his good time credit using the plain language of 18 U.S.C. § 3624(b)(1).

Petitioner won. The district court held that under the rules of statutory construction, § 3624 is unambiguous. In April 2004, the district court issued an order granting Petitioner's habeas corpus petition and directing Scibana to revise Petitioner's good time credit. Respondent filed a timely notice of appeal. The Court of Appeals for the Seventh Circuit then issued a decision reversing the district court's order on December 2, 2004.

The Seventh Circuit extended the deadline for a petition for rehearing until January 24, 2005, and on that date, Petitioner filed his petition for rehearing *en banc*. On February 9, 2005, the Seventh Circuit denied that petition. Petitioner now files his timely Petition for a Writ of Certiorari.

## REASONS FOR GRANTING THE WRIT

### A. The Bureau of Prisons' Determination that Prisoners Receive 47 Days of Good Time Per Year Rather than the 54 Days of Good Time Credit Intended by Statute Raises an Important and Expensive Question.

This case presents an issue of exceptional and nationwide importance. The BOP's interpretation of 18 U.S.C. § 3624(b)(1) involves the interpretation of a statute, which is the sort of issue that this Court previously has deemed an important question. *See, e.g., United States v. Ruzicka*, 329 U.S. 287 (1946).

Further, the fact that the outcome of this case could determine whether as much as $400,000,000 is added to the federal Bureau of Prisons' budget over the next several years gives this case a financial weight that warrants granting certiorari. *See United States v. Mitchell*, 463 U.S. 206, 211 n.7 (1983); *Commissioner v. Standard Life & Accident Ins. Co.*, 433 U.S. 148, 151 n.5 (1977); *Alaska v. American Can Co.*, 358 U.S. 224, 225 (1959).

The difference between the 54 days of good time for each year imposed that Petitioner thinks Congress intended, and the 47 days that the BOP allows (because it interprets the 54 days as applying only to years served), is staggering when applied to all federal inmates serving more than one year, but less than life. The policy affects approximately 155,092 federal prison inmates. *See* www.bop.gov/fact0598.html (calculated by adding all inmates serving one year or more, but less than life or a death sentence). In 1996, which was the most recent year that the Bureau of Justice Statistics reported, the average sentence of federal prisoners sentenced to

more than one year in jail was 78 months, or 6.5 years. Jodi M. Brown & Patrick A. Langan, *Felony Sentences in the United States, 1996*, BUREAU OF JUSTICE STATISTICS BULLETIN, at 7, Table 7 (July, 1999). With BOP awarding only 47 days of good time each year, rather than 54, the collective loss of liberty is more than 19,333 years.*

There is also a great financial cost to the Bureau of Prisons' interpretation. As of September 24, 2004, roughly the start of the current October Term, the average cost of prison confinement for one inmate was $23,181 per year. 69 FED. REG. 57364 (Sept. 24, 2004). Multiplied by the increased number of inmate years, that means more than $448,209,000 tax dollars are at stake. By its interpretation of § 3624(b)(1), the BOP may have required an increase of its budget by more than $448 million over time.

The question presented has further importance because it involves the overreaching of an executive branch agency into the province of the judiciary. Under the Sentencing Reform Act of 1984, federal judges continue to impose determinate, although now discretionary, sentences. *See United States v. Booker*, 125 S.Ct. 738 (2005). The legislature had an institutional prerogative to establish a determinate sentencing scheme, and thus to decide how much, if at all and at most, the sentence actually served might fall below the sentence imposed. Congress chose 54 days per year.

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* (155,092 x 6.5 x 7 ÷ 365) or 155,092 (inmates) multiplied by 6.5 (the average sentence length) further multiplied by 7 (number of days difference between BOP's calculation and the amount of good time allowed by statute) divided by 365 (days per year).

Because Congress also chose to leave judges some discretion in picking a determinate sentence, the judicial branch has an institutional interest in knowing at the time of sentencing how much, at most, an inmate's good behavior may reduce the otherwise determinate sentence imposed. A judge's choice of determinate sentence reasonably may be affected by that judge's calculation of the greatest possible good time credit.

The executive branch, by contrast, has no interest in deciding in general how long inmates should serve in prison. That is legislative and judicial work, after the end of indeterminate sentencing and executive branch parole administration. The Bureau of Prisons' interest is different. The BOP's interest is in assuring the safety, productivity and good order of federal prisons. It has an interest in stripping disobedient inmates of some (or all) of the good time they otherwise might earn, and thus applying an incentive for good behavior. So while it has no institutional interest in determining the maximum good time allowed to inmates generally, the BOP has a strong interest in determining how much of that maximum to allow each inmate specifically.

Courts routinely interpret ambiguous statutes. When they do, executive branch agencies must defer to those interpretations. *See, e.g., Neal v. United States*, 516 U.S. 284, 295 (1996). However, when the legislature delegates interpretation to the executive, the judicial branch under some circumstances must defer to executive branch interpretations. Courts only will defer to executive branch statutory interpretations when two conditions are present: first, the legislature wrote an ambiguous statute; and second, the legislature either expressly or implicitly delegated authority to interpret that particular ambiguity

to an executive branch agency. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

The express delegation to the BOP of authority to award credit to individual inmates, upon satisfactory compliance with institutional rules, does not imply any delegation to the BOP to determine the maximum good time available to all inmates in the abstract. The two tasks are unrelated and the latter belongs to courts, which must impose determinate and discretionary sentences.

This Court should grant the petition because the issue concerning the interpretation of § 3624(b)(1) is a question of first impression in this Court. That is a reason for granting certiorari. *See National Broiler Marketing Assn. v. United States*, 436 U.S. 816, 820 (1978). The uncertain interpretation of § 3624(b)(1) has led and will lead to increased prisoner litigation on the good time credit issue. *See* Todd Bussert & Joel Sickler, *Grid & Bear It*, THE CHAMPION at 42 March, 2005.

### B. The Seventh Circuit Misapplied Supreme Court Precedent When it Interpreted 18 U.S.C. § 3624 as Ambiguous and then Deferred to the Bureau of Prisons' Interpretation of the Statute, Pursuant to *Chevron*.

The Seventh Circuit's misapplication of Supreme Court precedent creates an apparent conflict with this Court's decisions, which is further reason for granting the writ. *See, e.g., United States v. Doe,* 465 U.S. 605, 610 (1984); *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982); *Henderson v. Kibbe*, 431 U.S. 145, 152 (1977).

The misapplication of Supreme Court precedent began with the Ninth Circuit's decision in *Pacheco-Camacho v. Hood*, 272 F.3d 1266 (9th Cir. 2001) (holding that 18 U.S.C. § 3624 is ambiguous and granting deference to the Bureau of Prisons' interpretation pursuant to *Chevron*). Relying primarily upon *Pacheco-Camacho*, several other courts repeated the misapplication of Supreme Court precedent. *See, e.g., Perez-Olivio v. Chavez*, 2005 WL 31913 (1st Cir. January 7, 2005) (also refused to apply the rule of lenity after determining that 18 U.S.C. § 3624 is not a criminal statute); *Brown v. Hemmingway*, 53 Fed. Appx. 338, 2002 WL 31845147 (6th Cir. 2002) (unpublished decision); *Williams v. Lammana*, 20 Fed. Appx. 360, 2001 WL 1136069 (6th Cir. 2001) (unpublished decision). However, some recent district court cases have come to the opposite conclusion after finding fault with the appellate courts' statutory interpretation and *Chevron* analysis. *Williams v. Dewalt*, 351 F. Supp.2d 412 (D. Md. 2004); *see also, Moreland v. Federal Bureau of Prisons*, No. CIV. A. H-04-3658, 2005 WL 757154 (S.D. Tex. March 30, 2005).

Under the two-step test adopted in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a court first must examine the statute at issue for ambiguity using the "traditional tools of statutory construction." *Chevron*, 467 U.S. at 842. At that first step, the Seventh Circuit erroneously determined that 18 U.S.C. § 3624(b)(1) is ambiguous. The plain language of the statute is clear. And Congress was clear that it intended in § 3624(b)(1) to base sentencing credit on the "term of imprisonment," not on time served. Where Congress' intent is clear, "that is the end of the matter." *Chevron*, 467 U.S. at 837. In the Seventh Circuit below, as well as in the other courts of appeals that have addressed the issue,

§ 3624(b)(1) was found to be ambiguous after only a "cursory nod to the rules of statutory construction and deferring to agency interpretation." *Williams*, 351 F.Supp.2d at 415.

If the plain language of § 3624(b)(1) has its ordinary and natural meaning as required by *Bailey v. United States*, 516 U.S. 137, 145 (1995), and many other decisions, the statute grants prisoners a credit "of up to 54 days at the end of each year of the prisoner's term of imprisonment" that was imposed. The Seventh Circuit erred in determining that the good time credit must be based on the time served rather than on the term of imprisonment imposed because the statute clearly states even prior to the amount of credit available that the credit applies to sentences "beyond the time served." *See* 18 U.S.C. § 3624(b)(1).

Moreover, because the good time credit applies to "each year of the *term of imprisonment*," the statue means that the credit is based upon the term imposed, as it means twice or thrice in the same sentence creating the credit. The rules of statutory construction require that "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986). Here, "term of imprisonment" is used four times in the same subsection of a statute within an act. The first and second time it appears, Congress was absolutely clear that "term of imprisonment" means term imposed because it qualifies "term of imprisonment" with the phrase "beyond time served." The rules of statutory construction compel the conclusion here that Congress intended "term of imprisonment" to have an identical meaning later in the same subsection.

The legislative history of the statute supports Petitioner's interpretation. That history demonstrates that there is no windfall conferred on prisoners by applying the good time credit to the term of imprisonment rather than to the time served. The legislative intention was to have prisoners serve 85% of their sentences. *See* H.R. REP. 99-614 at 9 n.4. Allowing for 54 days of good time credit, rounded off, means that well-behaved prisoners serve 85% of the sentence imposed. On the other hand, the BOP's interpretation allows for 47 days of good time credit, which would require the same prisoner to serve approximately 87.2% of the sentence imposed. Further, it reasonably can be inferred that Congress included language "beyond the time served" in 18 U.S.C. § 3624(b)(1) to prevent the BOP from basing the good time credit on the time served, rather than on the sentence imposed.

Moreover, even if Congress' language and intent were not clear and the statute is ambiguous, the Seventh Circuit erred in granting *Chevron* deference because the rule of lenity requires that, in the context of criminal punishment, any ambiguity should be resolved to favor liberty. *See United States v. Bass*, 404 U.S. 336, 347 (1971). "To the extent there remains any ambiguity in the statute after considering its most natural linguistic meaning and the legislative history, the rule of lenity eliminates all doubt." *Moreland*, 72005 WL 757154 at *7. The rule of lenity is a common law rule of statutory construction and this Court generally has applied the common law rules of statutory construction, such as the rule of lenity, to resolve ambiguity before applying the *Chevron* doctrine. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001); *see, also, Leocal v. Ashcroft*, 125 S.Ct. 377, 384 n.8 (2004); *Clark v. Martinez*, 125 S.Ct. 716, 724 (2005).

Finally, the Seventh Circuit erred when it determined that BOP Program Statement 5880.28 and the BOP regulation found at 28 C.F.R. § 523.20 were fungible and then, because the regulation was adopted pursuant to notice and comment rulemaking, awarded full *Chevron* deference to the BOP's program statement on § 3624(b)(1). The only way to understand how the BOP came upon 47 days as the amount of good time allowed by statute is to read the complex mathematical formula contained in the 257-page Program Statement. The 47-day figure cannot be determined from the regulation. Accordingly, the Program Statement, as a policy, and not the regulation is the operative agency authority for determining the maximum good time credit allowed. The Program Statement was not adopted pursuant to notice and comment rulemaking. This Court clearly has determined that policy statements are not entitled to *Chevron* deference. *See Christianson v. Harris County*, 529 U.S. 576 (2000); *United States v. Mead Corp.*, 533 U.S. 218 (2001).

## CONCLUSION

Petitioner prays that the Court grant a writ of certiorari and set this case for briefing and plenary consideration.

Respectfully submitted,

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May, 2005.

390 F.3d 997

United States Court of Appeals,
Seventh Circuit.
Yancey Lamarr WHITE, Petitioner-Appellee,
v.
Joseph SCIBANA, Respondent-Appellant.
**No. 04-2410.**

Argued Sept. 9, 2004.
Decided Dec. 2, 2004.
Rehearing En Banc Denied Feb. 9, 2005.
As Amended Feb. 14, 2005.

Emily M. Feinstein (argued), Quarles & Brady, Madison, WI, for Petitioner-Appellee.

Steven Pray O'Connor (argued), Office of the United States Attorney, Madison, WI, for Respondent-Appellant.

Before EASTERBROOK, EVANS and SYKES, Circuit Judges.

SYKES, Circuit Judge.

This appeal presents a question of statutory interpretation involving the calculation of "good-time credit" for prisoners serving federal sentences. Under the good-time statute, an eligible prisoner may receive credit "beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term," subject to the Bureau of Prisons' determination that "during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations." 18 U.S.C. § 3624(b)(1). Yancey White's behavior has been exemplary in all but one of his years behind bars: after serving eight years of his ten-year sentence for distribution of cocaine

base, he is entitled to all but ten days of the good-time credit allowed him under the statute. The question is, how much time is that?

The Bureau of Prisons interprets the good-time statute as allowing an award of up to fifty-four days of credit for each year the inmate *actually serves in prison.* The term an inmate actually serves is not the term imposed by the court but something less; annual good-time awards operate to incrementally reduce the term of imprisonment imposed in the sentence. The statutory good-time calculation is thus (according to the Bureau's interpretation) not fifty-four days times the number of years *imposed* but fifty-four days for each year actually *served.* According to this method of calculation, the Bureau plans to release White on March 3, 2005.

White contends that the good-time statute unambiguously entitles inmates to fifty-four days of credit for each year of the *sentence imposed,* minus any deductions for disciplinary violations. According to this method of calculation, White believes he is entitled to be released on December 23, 2004. He petitioned for relief under 28 U.S.C. § 2241. The district court agreed with White's interpretation of § 3624(b)(1) and ordered his release date recalculated. *White v. Scibana,* 314 F.Supp.2d 834 (W.D.Wis. 2004). We reverse.

## I. Background

In August 1996 Yancey White was sentenced by the United States District Court for the Southern District of Illinois to 120 months in prison for three counts of distributing cocaine base. He is serving that sentence at the Federal Correctional Institution in Oxford, Wisconsin. In

March 2003 White filed a request for administrative remedy asserting that his good-time credit had been miscalculated. He claimed entitlement to fifty-four days of good-time credit for each year of the ten-year sentence imposed by the court, or a total of 540 days. The warden denied the request, citing § 3624(b) and explaining that the statute allowed inmates to earn fifty-four days of good conduct time for each year served, not each year of the sentence imposed. The warden told White that because he would not be in service of the full ten-year sentence, his good-time credit could not be calculated by simply multiplying fifty-four by ten. Applying a formula the Bureau uses to calculate good-time credit on the basis of time served, the warden informed White that he was entitled to 470 days of good-time credit (later reduced by ten days for a disciplinary infraction). White appealed to the regional and central offices of the Bureau, both of which denied relief.

White filed a habeas corpus petition under 28 U.S.C. § 2241 in the United States District Court for the Western District of Wisconsin. The district court granted relief, concluding that "§ 3624(b) is unambiguous: 'term of imprisonment' means 'sentence imposed.' Therefore, the bureau must calculate an inmate's good conduct time on the basis of his sentence rather than on the time he has served." *White*, 314 F.Supp.2d at 836. The court ordered Warden Joseph Scibana to recalculate White's release date. The warden appealed.

## II. Discussion

The federal prisoner "good-time" statute provides, in pertinent part:

> (a) Date of release. – A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence as provided in subsection (b).
>
> (b) Credit toward service of sentence for satisfactory behavior. –
>
> (1) [A] prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life, *may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term,* subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations.
>
> . . . .
>
> [C]*redit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.*

18 U.S.C. § 3624 (emphasis added).

The Bureau has promulgated a rule reflecting its interpretation of the good-time statute: "[p]ursuant to 18 U.S.C. § 3624(b) . . . an inmate earns 54 days credit toward service of sentence (good conduct time credit) *for each year served.*" 28 C.F.R. § 523.20 (emphasis added). The Bureau has also issued, as part of its Sentence Computation Manual, Program Statement 5880.28, which depicts a formula addressing the problem of calculating good-time credit on sentences of a year and a day and provides

examples of the partial-year proration at the end of a sentence.

The Bureau's proration and year-and-a-day formula is based on the premise that for every day a prisoner serves on good behavior, he may receive a certain amount of credit toward the service of his sentence, up to a total of fifty-four days for each full year. Thus, under the Bureau's formula, a prisoner earns .148 days' credit for each day served on good behavior (54 / 365 = .148), and for ease of administration the credit is awarded only in whole day amounts. Recognizing that most sentences will end in a partial year, the Bureau's formula provides that the maximum available credit for that partial year must be such that the number of days actually served will entitle the prisoner (on the .148-per-day basis) to a credit that when added to the time served equals the time remaining on the sentence.[1]

When an agency interprets a statute it administers, judicial review is normally deferential. "We have long since recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). But the threshold question before deferential review is triggered is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is

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[1] As applied to a model inmate serving a sentence of a year and a day, the formula results in an anticipated release at day 319. On that day, the inmate will have earned forty-seven days of good time (319 x . 148 = 47.2), and 47 + 319 = 366, or the full year-and-a-day sentence. BOP Program Statement 5880.28 at 1-45.

the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S.Ct. 2778. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. 2778.

Not all agency interpretations of ambiguous statutes are entitled to full *Chevron* deference; some are treated as persuasive only, based upon the form, content, circumstances, and reflected expertise of the interpretation. *United States v. Mead Corp.*, 533 U.S. 218, 227-28, 238, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001), discussing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944). Full *Chevron* deference is limited to cases in which "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," as when the agency engages in adjudication or notice-and-comment rulemaking. *Mead*, 533 U.S. at 227, 121 S.Ct. 2164; *U.S. Freightways Corp. v. Comm'r. of Internal Revenue*, 270 F.3d 1137, 1141 (7th Cir.2001).

Other agency interpretations issued pursuant to comparable authority and procedure may also claim *Chevron* deference, *see Mead*, 533 U.S. at 230-31, 121 S.Ct. 2164; *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879 (7th Cir.2002), but neither the Supreme Court nor this court has clarified the outer limits of the universe of less formal agency interpretations that might qualify. We need not attempt to do so here (and the issue of lesser deference under *Mead-Skidmore* does not come into play) because the Bureau's interpretation of the good-time statute is

embodied in 28 C.F.R. § 523.20, adopted pursuant to notice-and-comment rulemaking. *See* 62 Fed.Reg. 50,786 (Sept. 26, 1997). The Bureau's discretion to resolve ambiguities in the good-time statute is implicit in its statutory authority to determine and award good time and release prisoners when their sentences, as adjusted by the Bureau for good-time credit, have expired. 18 U.S.C. §§ 3624(a), (b). The Bureau's interpretation of § 3624(b) is therefore entitled to full *Chevron* deference.[2]

But first there is the question of whether the statute is clear. The district court and the parties have focused primarily on the meaning of the statutory phrase "term of imprisonment." The phrase appears several times in § 3624. In subsection (a) the statute says that the Bureau shall release a prisoner "on the expiration of the prisoner's term of imprisonment, less any time credited" under subsection (b). The phrase "term of imprisonment" as used in subsection (a) must refer to the expiration of the *sentence imposed*, since it is axiomatic that a prisoner is released when he has served out his sentence. Similarly, in subsection (b), the statute provides that a prisoner is eligible for good-time credit if he is "serving a term of imprisonment of more than 1 year," other than a term of life imprisonment. In this part of the statute "term of imprisonment" must also refer to the sentence because the Bureau has to determine whether a prisoner is eligible for

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[2] The formula contained in Program Statement 5880.28 is premised upon the Bureau's position that 18 U.S.C. § 3624(b) allows fifty-four days of good-time credit for each year served. As we have noted, the Bureau's "time served" – as opposed to "sentence imposed" – interpretation of the good-time statute is contained in 28 C.F.R. § 523.20. Because the Program Statement is consistent with the regulation, we do not further address the Program Statement.

the credit on the first day he arrives in prison. Prisoners sentenced to terms of slightly more than one year may or may not spend one calendar year in prison, depending on how much good-time credit they ultimately receive. If "term of imprisonment" here means time served, then an inmate who initially would be eligible for the credit because his sentence was, say, 366 days, would become ineligible once the credit was taken into account.

But the specific use of the phrase "term of imprisonment" at issue here – in the part of the statute that describes how good-time credit is awarded – appears *not* to refer to the sentence imposed. Subsection (b) provides that a prisoner "may receive" good-time credit "beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment," subject to the Bureau's determination that the prisoner's behavior during that year has been exemplary. The statute thus establishes a process of awarding credit at the end of each year of imprisonment based on a review of the prisoner's behavior during that year, a process that would be undermined if "term of imprisonment" means "sentence imposed." This is because the accumulation of good-time credit reduces the amount of time a prisoner will ultimately spend in prison, sometimes (as in White's case), by more than an entire year. The Bureau cannot evaluate a prisoner's behavior and award credit for good conduct if the prisoner is not still in prison.

As we have noted, the statute anticipates the problem of a partial year at the end of a sentence by providing for proration of the credit for the partial year and awarding it in the last six weeks of the sentence. 18 U.S.C. § 3624(b)(1). But the Bureau cannot predict precisely the length of the partial year at the end of a prisoner's sentence when he

first sets foot in prison, for everything depends on whether good time is awarded at the end of each year. Thus, if "term of imprisonment" refers to the sentence imposed, it becomes impossible to award the credit based on an annual year-end assessment of the prisoner's behavior. And such retrospective annual assessment and award of credit appears to be at the core of what the good-time statute is all about.[3] To interpret "term of imprisonment" as "sentence imposed" for purposes of awarding good-time credit would entitle an inmate to receive credit for good conduct in prison for time – perhaps several years of time – that he was not in prison.

The district court applied the general rule of statutory construction that identical words used in different parts of the same statute are presumed to have the same meaning. *White*, 314 F.Supp.2d at 838-39, citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995), and *Firstar Bank, N.A. v. Faul*, 253 F.3d 982, 990

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[3] The warden points to the language of the prior good-time statute to emphasize the retrospective nature of good-time awards under the current statute. Congress adopted 18 U.S.C. § 3624 as part of the Comprehensive Crime Control Act of 1984, effective November 1, 1987. Its predecessor, 18 U.S.C. § 4161, provided that each prisoner "shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run." The amount of the credit varied based upon the length of the sentence, ranging from five days a month for a sentence at the low end (a sentence of six months to a year) to ten days a month for a sentence of ten years or more. A companion statute, 18 U.S.C. § 4165, provided that "earned good time may be forfeited" if the prisoner violated institutional rules. Thus, the prior good-time scheme contemplated a prospective good-time entitlement, subject to later forfeiture for disciplinary infractions. In contrast, 18 U.S.C. § 3624(1)(b) establishes a system of annual performance reviews and credit awards, subject to the proration for a partial final year and award in the last six weeks.

(7th Cir.2001). The rule is only a presumption, of course, and "the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 124 S.Ct. 1236, 1238, 157 L.Ed.2d 1094 (2004) (quoting *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433, 52 S.Ct. 607, 76 L.Ed. 1204 (1932)).

Sometimes when this canon of construction is invoked (or resisted), the apparent conflict is generated by uses of the same term in different parts of a large single piece of legislation. *See, e.g., Hotel Equities Corp. v. Comm'r of Internal Revenue*, 546 F.2d 725, 728 (7th Cir.1976); *Matter of Merchants Grain, Inc.*, 93 F.3d 1347, 1356 (7th Cir.1996). This case presents the unusual situation of an apparent conflict in meaning of the same phrase within a single statute, indeed within a single statutory subsection, which might otherwise strengthen the presumption in favor of harmonization. But it is impossible to make sense of 28 U.S.C. § 3624 while giving the phrase "term of imprisonment" one meaning throughout. "Term of imprisonment" can only mean "sentence imposed" when used in subsection (a) and in the eligibility language of subsection (b); attributing the same meaning to the phrase when it is used in subsection (b) to describe how good-time credit is awarded is inconsistent with the retrospective year-end evaluation and award system the statute contemplates. We must conclude that 18 U.S.C. § 3624 is ambiguous in that it does not clearly indicate whether the fifty-four days' credit for good conduct for each year of the prisoner's "term of imprisonment" is based on the sentence imposed

or the time served in prison. We defer to the Bureau's reasonable interpretation of the statute, which awards the credit for each year served in prison rather than each year of the sentence imposed.

One other circuit court has addressed this issue, and our decision today is consistent with its analysis. In *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1271 (9th Cir.2001), the Ninth Circuit concluded that § 3624 was ambiguous on the question of whether good-time credit was to be awarded on the basis of the sentence imposed or time served, and under *Chevron* deferred to the Bureau's interpretation. For the foregoing reasons, the order of the district court granting White's petition for a writ of habeas corpus under 28 U.S.C. § 2241 is REVERSED.

314 F.Supp.2d 834

United States District Court,
W.D. Wisconsin.
Yancey L. WHITE, Petitioner,
v.
Joseph SCIBANA,[1] Respondent.

**No. 03-C-581-C.**

April 23, 2004.

Emily M. Feinstein, Quarles & Brady, Madison, WI, for Petitioner.

Steven P. O'Connor, Assistant U.S. Attorney, Madison, WI, for Respondent.

OPINION AND ORDER

CRABB, Chief Judge.

Under 18 U.S.C. § 3624(b), a federal prisoner may earn up to 54 days of good conduct time for every year of his "term of imprisonment." The question presented in this petition for a writ of habeas corpus is one of first impression in this circuit: whether § 3624(b) requires the Bureau of Prisons to calculate an inmate's good conduct time on the basis of the inmate's sentence rather than on the time he has actually served. In an order dated December 22, 2003, I concluded that petitioner Yancey White had raised a substantial question about the bureau's method of calculating good conduct time. I ordered respondent

[1] In his petition, petitioner identifies the respondent as "Warden Scibana." It has come to my attention that respondent's full name is "Joseph Scibana." I have corrected the caption accordingly.

Scibana to show cause why the petition should not be granted.

The parties agree that 28 U.S.C. § 2241 is the proper vehicle for challenging the calculation of good conduct time, *Bell v. United States*, 48 F.3d 1042 (8th Cir.1995), that petitioner has properly exhausted his administrative remedies, *Clemente v. Allen*, 120 F.3d 703, 705 (7th Cir.1997), and that this court has jurisdiction to hear the petition. *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 494-96, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973). After considering respondent's arguments supporting the bureau's interpretation, I conclude that § 3624(b) is unambiguous: "term of imprisonment" means "sentence imposed." Therefore, the bureau must calculate an inmate's good conduct time on the basis of his sentence rather than on the time he has served. In other words, if a prisoner is sentenced to a 10-year term of imprisonment, he may earn up to 540 days of good conduct time in the absence of a disciplinary infraction. The bureau may not limit the application of good conduct time to the amount of time the inmate has already served. Accordingly, I will grant the petition for a writ of habeas corpus and order respondent to recalculate petitioner's good conduct time as § 3624(b) directs.

I find the following facts from the record.

## FACTS

Petitioner Yancey White is an inmate at the Federal Correctional Institution at Oxford, Wisconsin. In August 1996, the United States District Court for the Southern District of Illinois sentenced petitioner to 120 months in

prison after he was convicted of three counts of distributing cocaine base.

In March 2003, petitioner filed a request for an administrative remedy, arguing that under 18 U.S.C. § 3624, he was to receive "54 days [of good conduct time] for every year that [he] was given by the sentencing judge." Petitioner believed his projected release date should be December 2004 rather than February 2005 as the Bureau of Prisons had calculated. The warden denied petitioner's request for an administrative remedy, explaining that

> 54 days of GCT [good conduct time] may be earned for each full year served on a sentence in excess of one year, with the GCT being prorated for the last partial year. Since you will not be in service of a complete 120 months, you cannot calculate your GCT credits by 120 months by 54 days. Applying this formula, you are entitled to 470 days GCT for a 120-month sentence.

The regional director affirmed the warden's decision, writing that § 3624(b) "mandates GCT be awarded on the amount of time actually served, not on the length of the term imposed." Petitioner appealed to the administrator for national inmate appeals, who affirmed, stating that "the Bureau of Prisons computed your sentence as required by the Program Statement 5880.28, *Sentence Computation Manual – CCA* and all applicable statutes."

In December 2003, staff at the prison in Oxford prepared an updated computation for petitioner. After subtracting 10 days of good conduct time for a rule violation in April 2003, staff calculated that petitioner's projected release date was March 3, 2005.

## DISCUSSION

The issue in this case is whether the Bureau of Prisons' method for calculating good conduct time is consistent with 18 U.S.C. § 3624(b). That section provides:

> (b) Credit toward service of sentence for satisfactory behavior. –
>
> (1) Subject to paragraph (2), a prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term .... Subject to paragraph (2), credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

18 U.S.C. § 3624(b)(1).

The bureau has promulgated a regulation interpreting this provision as awarding good time credit on the basis of "each year served." 28 C.F.R. § 523.20. In Program Statement 5880.28, the bureau has set forth the formula it uses to calculate good conduct time. Under the bureau's formula, an inmate that receives a sentence of one year and one day can earn up to 47 days of good conduct time rather than 54 days.

When a court reviews an agency's interpretation of a federal statute, the threshold question is whether the interpretation is entitled to deference. The Supreme Court has applied varying levels of deference depending on the context of the interpretation. *E.g., Alaska Department of*

*Environmental Conservation v. EPA*, 540 U.S. 461, 124 S.Ct. 983, 157 L.Ed.2d 967 (2004) (internal guidance memoranda entitled to "respect" but not "dispositive force"); *Yellow Transportation, Inc. v. Michigan*, 537 U.S. 36, 45, 123 S.Ct. 371, 154 L.Ed.2d 377 (2003) (regulation promulgated after notice and comment entitled to highest level of deference when Congress has expressly authorized agency to promulgate rules). Regardless of the context of the interpretation, the agency is entitled to no deference if Congress has expressed its intent unambiguously in the statute. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). Agencies may fill gaps in ambiguous statutes; they may not contradict a statute's plain language. Further, a court should conclude that a statute is ambiguous and thus open to gap-filling by agencies "only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 124 S.Ct. 1236, 1248, 157 L.Ed.2d 1094 (2004).

In the December 22, 2003 order, I concluded that the pivotal clause in § 3624(b) is the one stating that an inmate may earn up to 54 days of good conduct time "at the end of each year of the prisoner's term of imprisonment." That clause raised the question whether the phrase "term of imprisonment" means "sentenced imposed" or "time served." If "term of imprisonment" refers to the sentence, an inmate's maximum potential good conduct time could be calculated by multiplying 54 days by the number of years in the sentence. In this case, petitioner would have been eligible to earn up to 540 days against his sentence (54 days x 10 years = 540 days). However, if a term of imprisonment is defined by the inmate's actual

time served, the number of good time credits that could be earned would be reduced and a more complicated calculation would be required because an inmate that earns good time will not actually serve his full sentence.

As an initial matter, respondent challenges the conclusion that the case turns on an interpretation of "term of imprisonment." He argues that the phrase establishes only "which federal inmates are eligible to earn good time credits against their sentences in the discretion of the Bureau." Resp.'s Br., dkt. # 15, at 9. Respondent does not develop this argument and I cannot agree with it. It is true that the statute allows good conduct time only for those prisoners serving a term of imprisonment of more than one year. But the statute says also that the inmate may receive 54 days of credit for every "year of the prisoner's term of imprisonment." If "term of imprisonment" means "sentence," an inmate would be eligible to receive good conduct time for each year of his sentence rather than for each year he has served. Thus, I adhere to the conclusion in the December 22 order that the bureau has no authority to calculate credits on the basis of time served if § 3624 unambiguously expresses Congress's intent to define "term of imprisonment" as "sentence imposed."

In isolation, the phrase "term of imprisonment" is arguably ambiguous. *See American Heritage Dictionary of the English Language* 175 (4th ed.2000) (defining "term" to mean both "[a] limited period of time" and "a period of time that is assigned to a person to serve"). However, words in a statute are not to be read in a vacuum; courts must read the statute as a whole to aid in determining the meaning of each of its parts. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991). A corollary to this rule is that identical words used in

different parts of the same statute are presumed to have the same meaning. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995).

The phrase "term of imprisonment" is used several times in § 3624. None of the other uses supports a "time served" interpretation of "term of imprisonment" and respondent does not argue to the contrary. For example, the first sentence of § 3624(a) provides, "A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment, less any time credited . . . ." This sentence can make sense only if a term of imprisonment is another way of saying the sentence imposed. If "term of imprisonment" means only the time *actually* served, there would be no need to subtract "time credited" to determine the release date because good conduct time would already be taken into account. This sentence is in essence a calculation for time served: Sentence imposed minus good time credited equals time served. There is no other way to read the provision.

Similarly, the first sentence of § 3624(b) provides that any "prisoner who is serving a term of imprisonment of more than 1 year" may earn good conduct time. (Section 3624(c) also refers to "a prisoner serving a term of imprisonment"). Again, this portion of the statute would make no sense if "term of imprisonment" means the time served. An inmate cannot be "serving" time he has already served. In this context, if Congress had intended "term of imprisonment" to mean "time served," it could have used the clause "a prisoner who *has completed* a term of imprisonment of more than one year." Further, a "time served" interpretation of "term of imprisonment" in this clause would make determining eligibility for good conduct time a perplexing process when the sentence is just over one year. For

example, an inmate who would initially be eligible for good time credit because his sentence was 366 days would become ineligible once his good conduct time was taken into account.

Even the bureau has interpreted the statute as making good conduct time available when the *sentence* is more than a year. *See* Program Statement 5880.28, *Sentence Computation Manual – CCA* (applying good time credit calculation to sentence of one year and one day), *attached to* Aff. of Christine Hine, dkt. # 15. Respondent does not explain why "term of imprisonment" should mean "sentence imposed" in one part of the statute and "time served" in another part.

It is true that the presumption that terms have a consistent meaning throughout a single statute may be overcome, as the Supreme Court reaffirmed recently. *Cline*, 124 S.Ct. at 1245. However, in *Cline*, the Court concluded that Congress did not intend to define the word "age" uniformly throughout the Age Discrimination in Employment Act because "age" has "several commonly understood meanings among which a speaker can alternate in the course of an ordinary conversation, without being confused or getting confusing." *Id.* at 1246. Unlike the word "age," the phrase "term of imprisonment" is not a common term in casual conversation. Rather, it is a legal term of art that Congress has employed in dozens of statutes, many of which were part of the Comprehensive Crime Control Act of 1984, the same act in which § 3624 was included. Throughout these statutes, Congress has uniformly used "term of imprisonment" as a synonym for "sentence." *E.g.*, 18 U.S.C. § 3147 ("A term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment."); 18 U.S.C.

§ 3156(a)(3) ("The term 'felony' means an offense punishable by a maximum term of imprisonment of more than one year."); 18 U.S.C. § 3582 (discussing "factors to be considered in imposing a term of imprisonment"); 18 U.S.C. § 3584(a) ("If multiple terms of imprisonment are imposed on a defendant at the same time . . . ."); 28 U.S.C. § 994(b) ("If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than 25 per centum."). It is fair to assume that if Congress had intended to make the calculation for good conduct time contingent on time served rather than the sentence imposed, it would not have used a phrase with such a clear and consistent meaning throughout the United States Code. *Firstar Bank, N.A. v. Faul*, 253 F.3d 982, 990 (7th Cir.2001) ("[W]here a word is given a consistent meaning throughout the United States Code, then the courts assume that it has that same meaning in any particular instance of that word.")

To support the bureau's interpretation of the statute, respondent points to 18 U.S.C. § 4161, which governed calculation of good time credits from 1959 until 1987. Section 4161 provided:

> Each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run, as follows . . .

According to respondent, § 4161 required the bureau to calculate an inmate's good conduct time on the basis of his sentence because the statute stated expressly that an inmate who behaves "shall be entitled to a deduction from the term of his *sentence.*" *See also* H.R. Rep. 86-935, *reprinted in* 1959 U.S.C.C.A.N. 2518 (noting that purpose of § 4161 was "to provide for the return to the method of computing good conduct time which was followed between 1902 and 1948," namely, "multiplying the number of months of a sentence as imposed by the court by the appropriate number of days as prescribed in the statute").

Respondent argues that it is indicative of legislative intent that Congress chose to change this language in the new version of the statute, but this argument is not persuasive. Replacing "sentence" with "term of imprisonment" does not evince an intent to change the method for calculating good time credits when Congress has used the terms interchangeably in so many other contexts. If anything, Congress's long history of using an inmate's sentence to calculate good conduct time supports a conclusion that Congress would have been more explicit if it had intended to adopt a different policy. *Firstar Bank*, 253 F.3d at 988 ("The courts presume that Congress will use clear language if it intends to alter an established understanding about what a law means; if Congress fails to do so, courts presume that the new statute has the same effect as the older version."). (Petitioner also cites statements by Senator Joseph Biden, who co-authored the Comprehensive Crime Control Act of 1984, that § 3624(b) was intended to give inmates good time credit of up to 15% of their sentences. 141 Cong. Rec. S2348-01 (Feb. 9, 1995); 140 Cong. Rec. S12314-01, S12350 (Aug. 23, 1994). However, because both of these statements were made well

after § 3624 was enacted, their probative value is limited. *Sullivan v. Finkelstein*, 496 U.S. 617, 628 n. 8, 110 S.Ct. 2658, 110 L.Ed.2d 563 (1990) (noting "difficulties inherent in relying on subsequent legislative history"); *St. Francis Hospital Center v. Heckler*, 714 F.2d 872, 880 (7th Cir.1983) ("[P]ost enactment history is not the surest guide of the legislative intent in initially passing the Act.")

Neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has held explicitly that § 3624(b) requires the bureau to calculate good conduct time on the basis of the sentence imposed. However, as petitioner points out, the court of appeals has assumed that an inmate may be able to deduct up to 15% of his or her *sentence* by earning good conduct time (54 days is approximately 15% of one year). *E.g., United States v. Martin*, 100 F.3d 46, 47 (7th Cir.1996) (assuming that inmate could earn 4.5 years of good conduct time on 30-year sentence, or 15%); *see also United States v. Prevatte*, 66 F.3d 840, 846 (7th Cir.1995) (Posner, J., concurring) (assuming that inmate can reduce *sentence* through good conduct time by up to 14.7%).

One court has determined that the meaning of "term of imprisonment" in § 3624 is ambiguous. *Pacheco-Camacho v. Hood*, 272 F.3d 1266 (9th Cir.2001). However, in coming to this conclusion, the court did not consider how the phrase was used in the first sentence of § 3624(a) and the first sentence of § 3624(b)(1), as well as in the rest of the criminal code. Moreover, the court did not take into account the history of the statute showing that Congress intended good conduct time to be deducted from an inmate's sentence. In finding the statute ambiguous, the court relied solely on the last sentence of § 3624(b)(1), which states that "credit for the last year or portion of a

year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence." The court concluded that a "sentence imposed" interpretation of "term of imprisonment" would be "inconsistent" with a requirement to prorate good time credits during the last year of the term. *Pacheco-Camacho*, 272 F.3d at 1268-69.

I respectfully disagree with the conclusion that § 3624(b)(1) is ambiguous because it requires the last year of the term to be prorated. This requirement would support the bureau's interpretation of the statute only if all prison sentences were imposed in whole years. Because defendants in federal court are sentenced to a term of months rather than years, many sentences will end in a number of months after the last full year. Thus, there is nothing inconsistent between prorating good time for the last year of the term and interpreting "term of imprisonment" to mean the sentence. Regardless of the interpretation of "term of imprisonment," an inmate's good time will have to be prorated when his or her sentence consists of a number of years and some odd months.

In *Pacheco-Camacho*, the court stated that a "sentence imposed" construction would result in a "bonus" to the inmate because he or she will receive credit in advance of earning it. Respondent makes a similar argument. Resp.'s Br., dkt. # 15, at 8 (["Petitioner's] proposed calculation allows prisoners to accrue good time credits for time they never serve.") However, this argument has force only if one assumes that the bureau's interpretation is the correct one. If one assumes that "a year" of the "term of imprisonment" is a year of the sentence imposed, then an inmate has completed a year of the term whenever the inmate's time actually served plus good conduct time equals 365 days (*e.g.*, 311 days served + 54 days of good conduct time

= 1 year of the term of imprisonment). Thus, the inmate still "earns" all of his good conduct time, but he does so at a faster rate than under the bureau's interpretation of the statute.

Finally, the Court of Appeals for the Ninth Circuit cited *United States v. Johnson*, 529 U.S. 53, 120 S.Ct. 1114, 146 L.Ed.2d 39 (2000), to support its conclusion that § 3624(a) does not inform the proper interpretation of § 3624(b). The court's reliance on *Johnson* is puzzling. In that case, the Supreme Court recognized only that under § 3624(e), a "term of supervised release" cannot begin until the inmate has been released from confinement. *Johnson*, 529 U.S. at 58-59, 120 S.Ct. 1114. It did not consider the correct interpretation of the phrase "term of imprisonment" or suggest that words in § 3624 have different meanings in different parts of the statute. Thus, *Johnson* is not instructive in this case.

Respondent makes one other argument not raised by the court in *Pacheco-Camacho*: adopting petitioner's interpretation of § 3624(b) would be contrary to Congress's intent to give the bureau discretion in awarding good conduct time. He relies on *Lopez v. Davis*, 531 U.S. 230, 121 S.Ct. 714, 148 L.Ed.2d 635 (2001), in which the Supreme Court concluded that the bureau had discretion under 18 U.S.C. § 3621(e)(2)(B) to deny a sentence reduction because the statute provides that the bureau "may" reduce sentences under particular circumstances. Respondent notes that § 3624(b) has a similar provision that an inmate "may" receive up to 54 days of credit for each year of the term of imprisonment.

Respondent confuses two very different issues. There is no question that the bureau has discretion to deny good

conduct time when it concludes that the inmate's behavior does not warrant it. Petitioner acknowledges that discretion. He is not challenging the bureau's decision to disallow 10 days of good conduct time after he was found guilty of a rule violation. However, discretion in *granting* good conduct time does not translate into discretion for choosing the method for *calculating* good conduct time. The statute does not say that the bureau "may" calculate good conduct time in any way it wants. Rather, the statute uses the phrase "term of imprisonment" as the basis on which good conduct time must be calculated.

As noted above, an agency does not have discretion to interpret a statute that is unambiguous. Because I have concluded that Congress had the unambiguous intent to define the phrase "term of imprisonment" to mean "sentence imposed," I conclude that the bureau did not have authority to promulgate a regulation that uses "time served" as the basis for the calculation. The petition must be granted.

ORDER

IT IS ORDERED that petitioner Yancey White's petition for a writ of habeas corpus under 28 U.S.C. § 2241 is GRANTED. Respondent Joseph Scibana is directed to recalculate petitioner's good conduct time on the basis of each year of his *sentence* rather than on time actually served.

**United States Court of Appeals**

For the Seventh Circuit
Chicago, Illinois 60604

February 9, 2005

HON. FRANK H. EASTERBROOK, *Circuit Judge*

HON. TERENCE T. EVANS, *Circuit Judge*

HON. DIANE S. SYKES, *Circuit Judge*

No. 04-240

YANCEY L. WHITE,
*Petitioner-Appellee,*

*v.*

JOSEPH SCIBANA,
*Respondent-Appellant.*

Appeal from the United States District Court for the Western District of Wisconsin.

No. 03 C 581

Barbara B. Crabb,
*Chief Judge.*

ORDER

On consideration of the petition for rehearing *en banc,* no judge in active service has requested a vote on the petition for rehearing *en banc* and all of the judges on the original panel have voted to deny rehearing. It is therefore ordered that rehearing *en banc* is DENIED.

**18 U.S.C. § 3624. Release of a prisoner**

**(a) Date of release.** – A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

**(b) Credit toward service of sentence for satisfactory behavior.** –

(1) Subject to paragraph (2), a prisoner who is serving a term of imprisonment of more than 1 year[1] other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. Subject to paragraph (2), if the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward service of the prisoner's sentence or shall receive such lesser credit as the Bureau determines to be appropriate. In awarding credit under this section, the Bureau shall consider whether the prisoner, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree. Credit that

[1] So in original. Probably should be followed by a comma.

has not been earned may not later be granted. Subject to paragraph (2), credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

**(2)** Notwithstanding any other law, credit awarded under this subsection after the date of enactment of the Prison Litigation Reform Act shall vest on the date the prisoner is released from custody.

**(3)** The Attorney General shall ensure that the Bureau of Prisons has in effect an optional General Educational Development program for inmates who have not earned a high school diploma or its equivalent.

**(4)** Exemptions to the General Educational Development requirement may be made as deemed appropriate by the Director of the Federal Bureau of Prisons.

**(c) Pre-release custody.** – The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community. The authority provided by this subsection may be used to place a prisoner in home confinement. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

**(d) Allotment of clothing, funds, and transportation.** – Upon the release of a prisoner on the expiration of the prisoner's term of imprisonment, the Bureau of Prisons shall furnish the prisoner with –

(1) suitable clothing;

(2) an amount of money, not more than $500, determined by the Director to be consistent with the needs of the offender and the public interest, unless the Director determines that the financial position of the offender is such that no sum should be furnished; and

(3) transportation to the place of the prisoner's conviction, to the prisoner's bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.

**(e) Supervision after release.** – A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days. No prisoner shall be released on supervision unless such prisoner agrees to adhere to an installment schedule, not to exceed two years except in special circumstances, to pay for any fine imposed for the offense committed by such prisoner.

**(f) Mandatory functional literacy requirement. –**

**(1)** The Attorney General shall direct the Bureau of Prisons to have in effect a mandatory functional literacy program for all mentally capable inmates who are not functionally literate in each Federal correctional institution within 6 months from the date of the enactment of this Act.

**(2)** Each mandatory functional literacy program shall include a requirement that each inmate participate in such program for a mandatory period sufficient to provide the inmate with an adequate opportunity to achieve functional literacy, and appropriate incentives which lead to successful completion of such programs shall be developed and implemented.

**(3)** As used in this section, the term "functional literacy" means –

**(A)** an eighth grade equivalence in reading and mathematics on a nationally recognized standardized test;

**(B)** functional competency or literacy on a nationally recognized criterion-referenced test; or

**(C)** a combination of subparagraphs (A) and (B).

**(4)** Non-English speaking inmates shall be required to participate in an English-As-A-Second-Language program until they function at the equivalence of the eighth grade on a nationally recognized educational achievement test.

**(5)** The Chief Executive Officer of each institution shall have authority to grant waivers for good cause as determined and documented on an individual basis.

28 C.F.R. § 523.20 Good conduct time.

<For statute(s) affecting validity, see: 5 USCA § 301; 18 USCA §§ 3568, 3624; 28 USCA §§ 509, 510.>

Pursuant to 18 U.S.C. 3624(b), as in effect for offenses committed on or after November 1, 1987 but before April 26, 1996, an inmate earns 54 days credit toward service of sentence (good conduct time credit) for each year served. This amount is prorated when the time served by the inmate for the sentence during the year is less than a full year. The amount to be awarded is also subject to disciplinary disallowance (see Tables 3 through 6 in § 541.13 of this chapter). Pursuant to 18 U.S.C. 3624(b), as in effect for offenses committed on or after April 26, 1996, the Bureau shall consider whether the inmate has earned, or is making satisfactory progress (see § 544.73(b) of this chapter) toward earning a General Educational Development (GED) credential before awarding good conduct time credit.

(a) When considering good conduct time for an inmate serving a sentence for an offense committed on or after April 26, 1996, the Bureau shall award:

(1) 54 days credit for each year served (prorated when the time served by the inmate for the sentence during the year is less than a full year) if the inmate has earned or is making satisfactory progress toward earning a GED credential or high school diploma; or

(2) 42 days credit for each year served (prorated when the time served by the inmate for the sentence during the year is less than a full year) if the inmate has not earned or is not making satisfactory progress toward earning a GED credential or high school diploma.

(b) The amount of good conduct time awarded for the year is also subject to disciplinary disallowance (see Tables 3 through 6 in § 541.13 of this chapter).